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No. 1138

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

THE BOSSERT MACHINE COMPANY, an Ohio corporation, and JULIUS G. BOSSERT,

Petitioners,

vs.

THE CITY OF CINCINNATI, a municipal corporation under the laws of the State of Ohio,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PHILIP J. SCHNEIDER

Counsel for Petitioners

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioners herein pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio entered December 18, 1968, reversing a judgment of the Court of Appeals of Ohio in favor of the Petitioners against the City of Cincinnati, Respondent.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported in 16 Ohio St. 2d 76, December 23, 1968, Issue No. 50, Ohio Bar (Advance Sheet); the opinion of the Court of Appeals of Hamilton County is reported in 14 Ohio Official Reports 35; 14 Ohio App. 2d 35. See Appendix A, p. 15 & B, p. 22, for full opinions.

STATEMENT OF THE CASE

The City of Cincinnati filed a petition to appropriate land located therein for Urban Renewal against Bossert Machine Company and Julius G. Bossert, the owners, on May 19, 1967. The value of the property was stated in the petition to be $24,000.00, although it had previously offered $28,000.00.

The owners employed counsel who employed real estate experts, who made a detailed appraisal and gave an opinion that the property was worth $65,000.00 This was not available until early in September, 1967.

O.R.C. § 163.08 fixed the answer date at June 17, 1967, but real estate appraisers could not and did not give their opinion until the early part of September and on September 13, 1967, answers were filed "by leave" of the Common Pleas Court alleging the $65,000.00 value.

On September 19, 1967, the City separately moved:

(1) to strike Bossert's answers; and

(2) to declare the value at the amount stated in the petition.

On September 27, 1967, Bossert filed "by leave" of court motions to strike both City motions, on the grounds: ". . . for the reason that to deprive defendants of their right to trial by jury would violate the provisions of Article I, Section 19 of the Constitution of Ohio, which provides that any private property taken for public use shall be compensated for in money and such compensation shall be assessed by a jury", and further violates the provisions of the *Bill of Rights, Amendment 5, of the Constitution of the United States, in that it would deprive a person of his property "without due process of law; neither shall private property be taken for public use without just compensation;"* and to deprive defendants of their right

to trial and compensation by a jury because their answers, heretofore filed by leave of court but after the rule day prescribed in § 163.08, which purports to deprive the Court of its inherent right to grant an extension of time to plead, *violating Article III, Sections 1 and 2 of the Constitution of the United States,* and Article IV of the Constitution of Ohio. Further evidence of the unconstitutionality of the purported limitation of power is that the City's motion seeks that the Court fix the value of defendants' property at $24,000.00, when it had previously offered $28,000.00 for the same, and the defendants by their answer claim a value of $65,000.00." (Emphasis added).

On October 27, 1967, after briefs and oral argument, the Trial Court granted both motions of the City, struck the answers of Bossert, and declared the value of the property to be taken to be $24,000.00, as alleged in the petition.

On November 1, Bossert filed its Notice of Appeal to the Court of Appeals, First Appellate District of Ohio. After briefs and oral argument that Court reversed the judgment and ordered the case remanded for further proceedings.

Therein the Court of Appeals discussed the Fifth and Fourteenth Amendments of the Constitution of the United States as well as the Constitution of Ohio, and said, inter alia:

> "The phrase, 'due process of law,' as used in the Fifth and Fourteenth Amendments to the Constitution of the United States, is derived from the phrase, 'law of the land,' * * *
>
> "Due process of law does not consist of legislative ledgerdemain but rather is intended to secure the individual from the arbitrary exercise of the powers of government — unrestrained by the higher law of the land.
>
> "We, therefore, consider that provision wherein the Legislature attempts to deny the Court the right to rule on an application to extend the time of pleading

"The right of a landowner to be compensated for private property taken for public use is not statutory but guaranteed by Section 19 of Article I and Section 5 of Article XIII of the Constitution of Ohio, which also assures that a jury shall determine the amount of such compensation. Rights so secured cannot be taken away by legislation such as § 163.09 R.C.

" 'The fundamental requirement of due process of law is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which constitutional protection is involved.' *Anderson National Bank* v. *Luckett.* 321 U.S. 233."

There was diversity of opinion by other inferior courts, before this Ohio Supreme Court decision, as to the constitutionality of the two statutory provisions, some of them ruling that the permissive provision of § 163.08 providing "any owner may file an answer to such petition", should not result in a taking at some ridiculous[1] figure alleged in the petition and to do so is unconstitutional.

In a much earlier case the Supreme Court of Ohio held:

"We are inclined to give this construction to the statute for the reason, among others, that we deem it beyond the power of the Legislature to bar, by a statute of limitations, an action or a right secured by a constitutional provision immediately upon the accruing or maturing of the right. Such legislation, if not in terms, would, in effect, nullify the Constitution, and work a forfeiture of private property * * *." *Reckner* v. *Warner,* 22 Ohio St. 275 (1872).

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[1] Counsel herein represent another property owner where the value is alleged by the State of Ohio to be $5.00 for a valuable property. Since the publishing of this opinion of the Supreme Court many counsel from other parts of Ohio have telephoned and said their clients are going to lose their property due to a government-alleged value of $1.00.

In a much later case the Ohio Supreme Court, *Scharlo* v. *State*, 105 Ohio St. 535 (1922), held an act of the General Assembly unreasonable, unconstitutional, null, and void, where it attempted to peremptorily prescribe the time within which a court in the exercise of its judicial function was mandatorily required to hear and determine and held:

> "Syl. 4. An act of the general assembly attempting to peremptorily prescribe the time within which any court in the exercise of its judicial function shall hear or determine a matter properly within its jurisdiction is a legislative invasion of judicial power, and, as such, is unreasonable and unconstitutional, and therefore null and void."
>
> "Whether or not justice is administered without 'denial or delay' is a matter for which the judges are answerable to the people and not to the General Assembly of Ohio."

In 1963 a Court of Appeals of Ohio in the case of *In Re: Appropriation by Dir. of Highways*, 120 Ohio App. 273; 201 N.E. 2d 889, cited and followed, among other cases, the *Scharlo* case. In this case the subject statute, O.R.C. § 5523.12, not nearly as mandatory as § 163.08-.09, provided in part:

> "Thereupon the Court shall assign such claims for trial within a reasonable time."

At page 893 of 201 N.E. 2d, that Court held:

> "It has long been held that the Legislature may not deprive a court of its jurisdiction to act by placing an arbitrary limit upon the time for hearing; that a court is in command of its own docket and must itself determine when a matter will be heard."

After citing additional cases, the Court continued:

> "Although the provision of Section 5523.12 Revised Code, as to trial before completion of the improvement relates to the prayer in the application *and does not purport to impose a mandatory duty upon the Court it would,* under the cited authorities, be invalid were it found to be mandatory and jurisdictional. Moreover, were we to hold the same jurisdictional, the appellant would himself be deprived of a statutory remedy designed to provide him a means of obtaining compensation and damages for the appropriation." (Emphasis added.)

The provisions of § 163.08, forbidding any extension of time, and § 163.09, requiring the Court to declare the value of subject property to be any amount as set forth by the agency, are both absolutely mandatory and leave no opportunity for judicial discretion or a jury determination.

The law of Ohio, concerning leave to plead, for more than 100 years before the enactment of § 163.08 has been as quoted by Judge Herbert (supra).

As this Court knows, justifiable reasons for granting leave to plead, such as death, disability, minority, absence from the state, and sufficient time to investigate and prepare adequate defense are in reality too varied and innumerable to list. It is for this obvious reason that the law of Ohio has been that judicial discretion shall determine in each case whether good cause is shown. This still is the law of Ohio in every other known situation with the *sole exception* being in appropriation suits under § 163.08. Under the application of this section however, we never have the fact question of whether there was justifiable reason for delay in filing a pleading, or whether there was abuse of discretion by the Court in granting

or refusing to grant an extension of time. Arbitrarily, the legislature has stated that in the appropriation of private property no such justifiable reason could exist.

In this connection we point out that Bossert's answers were filed *by leave of court.* Cincinnati made no move nor did anything until Bossert filed answers. This "take" was for urban renewal and not for highway or immediately usable improvements. Much of the property in this whole urban renewal area is still uncleared, although this suit was filed May 19, 1967. Nor is there any official plan for its use.

Certainly the right to a trial by jury is "due process of law" under Amendment 14.

In *Anderson National Bank* v. *Luckett,* 64 Sup. Ct. 599, 321 U.S. 233, this Court said:

> "Fundamental requirement of due process of law is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which constitutional protection is invoked."

In *Shelley* v. *Kraemer,* 68 Sup. Ct. 836, 334 U.S. 1, at 16, this Court held:

> "The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and an opportunity to defend, has long been regarded as a denial of due process of law, * * *."

In *State* v. *Brown,* 182 S.E. 838, 294 Sup. Ct. 294, appeal dismissed, 56 Sup. Ct. 750, 298 U.S. 639, the Court held:

> " 'Due process of Law' requires that a person shall have a reasonable opportunity to be heard before a legally appointed and qualified impartial tribunal before any binding decree, order, or judgment can

be made affecting his rights to life, liberty, or property."

The Ohio Legislature, in providing that "any owner *may* file an answer" creates no new right, and certainly it has the power to fix the time within which such answer may be filed. However, when the Legislature goes farther and provides that "No extension of time for filing of an answer shall be granted," it deprives the courts of a judicial function which may not be invaded. That judicial function has continued in Ohio since 1851, and has never been changed except in appropriation cases, and there without direct reference plus this ruling of the Ohio Supreme Court. Public interest in urban renewal matters does not require such change.

Compounding that abuse of power, the Legislature proceeded to deprive a property owner of his property without jury determination of the value by manditorily requiring the court to fix the value at *any amount* set out in "any document filed with the Clerk", and without any limitation whatsoever.

SPECIFICATIONS OF ERROR TO BE URGED

The Supreme Court of Ohio erred in holding that §§ 163.08 and 163.09 Revised Code, limiting a judicial function, and depriving a property owner of his property without due process of law and without a jury fixing the compensation therefor were constitutional.

REASONS FOR GRANTING THE WRIT

This case involves the new and novel "quick-take" theory for not only highway and kindred projects, but extends it to all of Urban Renewal, which contemplates govern-

mental agencies acquiring property for future improvement, where there is no immediacy to the use. This new and novel practice in appropriation actions is a positive erosion of the fundamental property rights of individuals. The claimed immediate need for either its acquisition or its use is completely lacking and is designed only to clear land for hopeful future development.

The constitutionality of these two sections which facilitate this "quick-take" practice is questioned because O.R.C. § 163.08 forbids the Court from granting a property owner any extension of time within which to file his answer. The Legislature's power to prescribe the time within which certain steps in judicial proceedings should be taken is not questionable, but the attempt to prevent any extension of time for the filing of pleadings after jurisdiction has been properly invoked is not only arbitrary but an unconstitutional invasion into the authority of the judicial branch of the government. The Court's jurisdiction is properly invoked by the filing of a petition. Thereafter the Court should have jurisdiction until a final determination of the issues. Any attempt to control a court's free exercise of discretion and judgment depriving it of its inherent right to manage, to direct, and determine the urgency of pleadings is a clear violation of both the United States and the Ohio Constitutions.

To hold that the time requirement for filing of an answer is jurisdictional as the Supreme Court of Ohio decided, and then go further, and hold that although the Court's authority has terminated yet it shall continue to act by declaring the value of the property and damages, if any, to be whatever amount the agency has set forth in "any document properly filed with the Clerk" is to effect a judicial function by legislative mandate.

Clearly this deprives the property-owner of his State and Federal Constitutional rights to have the valuation of his property determined by a jury. These statutory limitations raise not only the question of procedural due process under either the Fifth and Fourteenth Amendments, but are neither fair, reasonable, nor just, and violate the very spirit of these amendments.

Chief Justice Taft and Judge Schneider suggested that the arbitrary result of depriving trial courts of discretion of granting leave to plead, where it should be exercised, could be easily prevented by adding the qualifying words, "where reasonable cause is not shown" to the restriction on granting the property owner time to file an answer. If there truly is a fear that courts are no longer capable of reason and judgment in the time-honored exercise of judicial discretion in granting leave to plead, then such legislative control of the judiciary must be accepted. Those words were not incorporated into the statute and it is doubtful that they would help in preventing arbitrary extensions, when the fundamental essence of such discretion itself dictates that such must be the product of reason and purpose.

Another example of arbitrary application of this quick-take procedure was where one of the amicus curiae, intervening cities, prevailed upon the trial court to find that only an answer could be filed, excluding all other pleadings. There the property owner had moved to dismiss the petition to appropriate because of defects in the City's resolution. Thereupon the trial court fixed the value filed with the clerk. It required a Court of Appeals to reverse that action. An unnecessarily costly procedure.

Other provisions of these quick-take statutes will probably be reviewed by the Supreme Court of Ohio. However, it is of deep concern that the rights of individuals

are being violated by this legislative control of judicial procedure. That court should be instructed that neither judicial discretion nor property rights may be so arbitrarily handled.

While the amount of money may appear small in comparison to the many cases considered by this court, such should not be a determining factor in this Petition for a Writ of Certiorari. The constitutional right of this and other property owners is the real issue.

While the Supreme Court held (App. B, p. 24):

> "* * * The duty of that body (jury) is to resolve conflicting contentions of the parties from the evidence and *not from the claims contained in the pleadings.*"

But § 163.08 specifically provides:

> "* * * unless such matters are specifically denied in the answer and the *facts relied upon in support of such denial are set forth therein.* * * *" (App. D, p. 29)

Here the fact relied upon was a $65,000. valuation.

§ 163.09 grants a default judgment without providing any safeguards.

CONCLUSION

For the reasons stated, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

PHILIP J. SCHNEIDER
Counsel for Petitioner

APPENDIX A

OPINION OF COURT OF APPEALS FOR HAMILTON COUNTY

* * *

1. The provision of Section 163.08, Revised Code (131 Ohio Laws 183), that no extension of time for filing of an answer by a property owner to a petition for the appropriation of such owner's property by a public agency shall be granted, is an unconstitutional usurpation of the judicial right to rule on an application to extend time of pleading and violates due process of law.

2. The provision of Section 163.09 (A), Revised Code (131 Ohio Laws 184), permitting the court, in certain instances, to fix the value of the property taken and the damages to be as set forth in the petition of such public agency, violates Section 19 of Article I of the Constitution and is void.

(No. 10416—Decided March 4, 1968.)

APPEAL: Court of Appeals for Hamilton County.

Mr. William A. McClain and *Mr. Thomas H. Crush,* for appellee.

Messrs. Waite, Schindel, Bayless & Schneider, Mr. Philip J. Schneider and *Mr. George C. Schiele,* for appellants.

HILDEBRANT, J. The parties are in accord with the following statement of the case:

"A petition for appropriation of real estate was filed in the Common Pleas Court of Hamilton County, Ohio, by the city of Cincinnati on May 19, 1967, against defendants-appellants. On September 13, 1967, defendants, The

Bossert Machine Company and Julius G. Bossert, filed their answers by leave of Common Pleas Court. On September 19, 1967, the city of Cincinnati filed a motion to strike the answers from the files, and simultaneously filed a petition for the declaration of value at the amout set forth in its petition.

"On September 27, 1967, defendants filed by leave motions to strike the city's motion to strike the answers, and also to strike the city's motion to fix value, on the ground that to deny defendants the right to a trial by jury and to arbitrarily fix the value at the amount set forth in the petition, without the intervention of a jury violated Article I, Section 19, of the Constitution of Ohio; Bill of Rights, Amendment 5 of the Constitution of the United States; Article III, Section 2, of the Constitution of the United States; and Article IV of the Constitution of Ohio.

"Memorandum briefs were filed by defendants, oral arguments were heard, and both motions of the defendants were overruled. The motions of the city to strike the answers were granted, and the motion for declaration of value was also granted, and the value of the property was fixed at the amount set forth in the petition. Entries accordingly were entered on the 27th day of October, 1967."

Neither is there any dispute as to the following:

"The stricken answers claimed a valuation of the property at $65,000. The motion for declaration, which was granted, fixed the value at $24,000. The motion to strike the motion for declaration of value showed the city had previously offered $28,000 for the same property."

Chapter 163 of the Revised Code (131 Ohio Laws 179 *et seq.*), effective January 1, 1966, provides the general procedure for appropriation of property as distinguished

from special procedural provisions applicable to the Department of Highways, conservancy and sanitary districts.

Sections 163.08 and 163.09, Revised Code, provide in part:

Section 163.08. "Any owner may file an answer to such petition. * * * Any answer shall be filed on or before the third Saturday after the return day of summons or service by publication * * *. No extension of time for filing of an answer shall be granted."

Section 163.09. "(A) If no answer is filed pursuant to Section 163.08 * * * the court on motion of a public agency shall declare the value of the property taken and the damages, if any, to be set forth in the petition. In all other cases the court shall fix a time, within twenty days from the last date that such answer could have been filed, for the assessment of compensation by a jury."

Defendants, appellants herein, contend the striking of their answers and the fixing of the value of the appropriated property at the amount fixed by the city was prejudicial error, and stated the question presented to be:

"Is the absolute deadline fixed by R. C. Section 163.08 for filing and answer by a property owner and the fixing of the value at the amount set forth in the petition, in the absence of same, R. C. Section 163.09, thus depriving such property owner of his constitutional right to have a jury determine the value thereof, constitutional under either or both the Ohio and United States Constitutions?"

In upholding the constitutionality of Sections 163.08 and 163.09, Revised Code, the court below summarily relied upon two decisions of the Supreme Court of Ohio holding that the time limitation for pleading contained in the special statutes on appropriation by the Department of Highways was a statute of limitation and is mandatory and jurisdictional, to wit, *In re Appropriation for*

Highway Purposes: Mashetter, Director of Highways v. *Huysman,* 177 Ohio St. 118; and *In re Appropriation of Easements for Highway Purposes,* 172 Ohio St. 338.

General or pure statutes of limitation relate to the remedy rather than the right; whereas, in special statutory provisions creating and qualifying a given right if exercised within a given time, the time limitation is an inherent part of the statute, so that after the time runs the right is extinguished.

In the two cases cited *supra,* the court concerned itself solely with the effect of statutes of limitation and considered the special provisions of Section 5519.01 *et seq.*, Revised Code, as creating new and additional jurisdiction in the Common Pleas and Probate Courts, and the statutory provisions as to the time of pleading, misnomered an appeal, to be newly created and, hence, jurisdictional.

An examination of the transcript, papers and briefs considered by the Supreme Court of Ohio in *In re Appropriation for Highway Purposes,* 177 Ohio St. 118, above, reveals that no constitutional question was posed, argued or considered by that court. We, therefore, distinguish those cases from the case at bar.

The Constitution vests the judicial power of the state government in certain courts, including Courts of Common Pleas; implicit in the wielding of that power is the right and duty to resist any invasion thereof by either the executive or legislative branch of government.

The Legislature very properly prescribes the procedure and fixes time limitations for the prescribed pleadings, following which the implications of default may be prescribed.

Section 163.08 of the Revised Code, in providing "any owner may file answer to such petition," grants no new right not already in existence by virtue of due process

of law; the statute therein very properly fixes time for filing the answer and goes on to provide that "No extension of time for filing of an answer shall be granted."

The granting or withholding of an extension of time for pleading in the interest of justice and for good cause shown is, in the opinion of this court, a judicial function which may not be invaded by act of the Legislature. Due process so requires and has been recognized by the Legislature as the policy of the state in adopting Section 2309.42, Revised Code, which states: "Upon such terms as are just, the court, or a judge thereof in vacation, for good cause shown, may extend the time for filing any pleading."

The phrase, "due process of law," as used in the Fifth and Fourteenth Amendments to the Constitution of the United States, is derived from the phrase, "law of the land," as used in the *Magna Charta;* neither phrase has been exactly defined. In the *Dartmouth College case* (*Trustees of Dartmouth College* v. *Woodward,* 4 Wheat. [17 U. S.] 518), Daniel Webster said, at page 581:

"* * * By the law of the land is most clearly intended the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. * * *"

Due process of law does not consist of legislative legerdemain, but rather is intended to secure the individual from the arbitrary exercise of the powers of government—unrestrained by the higher "law of the land."

We, therefore, consider that provision wherein the Legislature attempts to deny the court the right to rule on an application to extend the time of pleading violates the requirements of due process of law and, further, is an unconstitutional invasion of the judicial power and

void. It, therefore, was error prejudicial to the defendants to strike their answers from the files.

The most drastic exercise of government power imposed upon the governed, other than the taking of life or liberty, occurs in the taking of private property for public use; due process of law secures the individual owner the right to resist by all lawful means. If the provision against extending the time to answer were valid, or in the event the court refused to extend the time, the court is required to make orders appropriate to a default in pleading. As to compensation and damages, the only order the court can and should make is compliance with the plain mandate of Section 19, Article I of the Ohio Constitution to fix a time for impaneling a jury to assess compensation and damages with notice to the dissatisfied owner, giving him opportunity to participate fully at the trial, offer evidence, examine and cross-examine witnesses, and be fully heard.

As far back as *Reckner* v. *Warner,* 22 Ohio St. 275, in the opinion, at page 294, the court states:

"We are inclined to give this construction to the statute for the reason, among others, that we deem it beyond the power of the Legislature to bar, by a statute of limitation, an action or a right secured by a constitutional provision immediately upon the accruing or maturing of the right. Such legislation, if not in terms, would, in effect, nullify the Constitution, and work a forfeiture of private property. * * *"

See, also, *King* v. *Greenwood Cemetery Association,* 67 Ohio St. 240.

The provision of Section 163.09 (A), Revised Code, permitting the court to fix the value and damages is squarely in conflict with Section 19, Article I of the Ohio Constitution and, therefore, unconstitutional and void.

We were cited to but one decided case on the identical question raised here, wherein the Common Pleas Court of Montgomery County reached a diametrically opposite conclusion to that of the Hamilton County Court here under review. In its opinion, the Montgomery County Court said:

"The court finds that any construction of the two foregoing sections which denies the owner of property being taken by eminent domain the right to have compensation assessed by a jury violates Article I, Section 19 of the Constitution of Ohio."

We approve that statement.

It was, therefore, error prejudicial to the defendants for the court to grant the motion to fix the value of the appropriated property at the amount set forth in the petition.

In summary, we find the portions of the two sections of the statutes referred to above are unconstitutional and void as lacking in the requirement of due process of law, an invasion of judicial power by the Legislature, and a direct violation of the provisions of Section 19, Article I of the Constitution of Ohio.

The judgment is reversed, and the cause is remanded for further proceedings according to law and this opinion.

Judgment reversed.

LONG, P. J., concurs.

APPENDIX B

OPINION OF THE SUPREME COURT OF OHIO

* * *

1. The mandate of Section 163.08, Revised Code, that "no extension of time for filing of an answer shall be granted" to a defendant whose property is the subject of a petition for appropriation by a public agency must be obeyed by the trial court. The statute does not violate due process nor trench on any judicial prerogative.

2. The provision of Section 163.09, Revised Code, requiring the court to "declare the value of the property taken and the damages to be as set forth in" the petition of the appropriating agency, upon the failure of the owner to file his answer pursuant to Section 163.08, Revised Code, does not transgress Section 19, Article I of the Ohio Constitution, granting the right to a jury assessment of compensation.

Opinion, per SCHNEIDER, J.

(No. 68-225—Decided December 18, 1968.)

APPEAL from the Court of Appeals for Hamiltion County.

The city of Cincinnati, appellant, filed a petition on May 19, 1967, against defendants to appropriate their land, in which petition the value thereof was stated to be $24,000. Service of process was made in due course and no issue is raised that defendants failed to receive timely notice of the pendency of the action. Final answer date was June 17, 1967, under Section 163.08, Revised Code, which provides that "any answer shall be filed on

nates the owner's pleading as an "answer." In either case, the purpose of the responsive pleading is to raise the issue of the proper valuation. In both of the above-mentioned highway appropriation cases, the landowners filed "petitions" by leave of court after the statutory time had passed. We held that the trial court had no power to extend the statutory time. The same reasoning controls this case.*

Appellees' sole argument here is that the length of time permitted to them by the statute to respond to the proceeding by the city prevented them from having their property properly appraised on their behalf and from including their valuation of the property, based on that appraisal, in their answer. We are unable to relate that argument to their conceded right, if not waived, to a trial of the valuation issue by a jury. A statement of the amount of their claim for compensation in their answer could serve no useful purpose. It is disfavored practice to submit the pleadings to the jury. The duty of that body is to resolve conflicting contentions of the parties from the evidence and not from the claims contained in the pleadings.

The Constitution of Ohio authorizes the General Assembly to define the jurisdiction of the Court of Common Pleas. But the power to grant jurisdiction includes the power to withhold it. *Madjorous* v. *State,* 113 Ohio St. 427, 431. In this instance, the General Assembly has

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* TAFT, C. J., and the writer believe that the following phrase should have appeared at the end of this sentence: "where as in each of those cases, the landowner advanced no reasonable justification for failure to file his responsive pleading within the time provided by the statute." Similarly, paragraph one of the syllabus should be so qualified. The majority of the court, however, adheres to the rule that the time for filing the answer is jurisdictional. *Masheter* v. *Huysman,* 177 Ohio St. 118.

merely exercised its prerogative to prescribe procedures not inconsistent with the jurisdiction granted. See *In re Miller,* 160 Ohio St. 529, 537.

Although Section 2309.42, Revised Code, confers upon the courts the general power to extend the time for filing any pleading upon the showing of good cause, that general power to extend time was withdrawn from land appropriation cases under Chapter 163 by the provisions of Section 163.08, Revised Code, quoted above. The rule is that a specific statute will prevail over the provisions of a prior enacted general statute. *State, ex rel. Bd. of Edn.,* v. *Schumann,* 7 Ohio St. 2d 41, 43; *Acme Engineering Co.* v. *Jones,* 150 Ohio St. 423; 50 Ohio Jurisprudence 2d 82, *Statutes,* Section 102.

Appellees claim, and the Court of Appeals held, that their right under Section 19, Article I of the Constitution, to have a jury fix the compensation for the property taken was violated by the instant procedure. But the right to a jury trial, though inviolate, may be waived. *Cassidy* v. *Glossip,* 12 Ohio St. 2d 17; *Bethesda Hospital Assn.* v. *Preston,* 175 Ohio St. 277. The constitutional guarantee of a jury trial nonetheless permits the legislative branch to set forth procedures by which the jury is obtained. *Reckner* v. *Warner,* 22 Ohio St. 275. See, also, 30 Corpus Juris Secundum, 36 and 407, *Eminent Domain,* Sections 281 and 372. Appellees' failure, without justification, to conform to those procedures constitutes waiver of a trial by jury.

The judgment of the Court of Appeals is reversed.

Judgment reversed.

TAFT, C. J., ZIMMERMAN, MATTHIAS, O'NEILL and BROWN, JJ., concur.

It is ordered and adjudged also that appellant recover from appellees its costs expended in this Court; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this 6th day of January, 1969.

/s/ THOMAS L. STARTZMAN, Clerk
/s/ SAM F. ADKINS, Deputy

APPENDIX D – STATUTES

Ohio Revised Code

§ 163.08 Answer by property owner to petition.

Any owner may file an answer to such petition. Such answer shall be verified as in a civil action and shall contain a general denial or specific denial of each material allegation not admitted. The agency's right to make the appropriation, the inability of the parties to agree, and the necessity for the appropriation shall be resolved by the court in favor of the agency unless such matters are specifically denied in the answer and the facts relied upon in support of such denial are set forth therein, provided, when taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, an answer may not deny the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation. Any answer shall be filed on or before the third Saturday after the return day of the summons or service by publication as set forth in section 163.07 of the Revised Code. No extension of time for filing of an answer shall be granted.

§ 163.09 Valuation of property taken; how determined.

(A) If no answer is filed pursuant to section 163.08 of the Revised Code, nor approval ordered by the court to a settlement of the rights of all necessary parties, the court on motion of a public agency shall declare the value of the property taken and the damages, if any, to be as set forth in any document properly filed with the clerk of courts, by the public agency. In all other cases the court shall fix a time, within twenty days from the last date that such answer could have been filed, for the assessment of compensation by a jury.

SUPREME COURT, U. S.

No. 1138

FILED
APR 9 1969
JOHN F. DAVIS, CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

THE BOSSERT MACHINE COMPANY,
An Ohio Corporation and
JULIUS G. BOSSERT,
Petitioners,

vs.

THE CITY OF CINCINNATI,
A municipal corporation under the laws
of the State of Ohio,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

WILLIAM A. McCLAIN
City Solicitor

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

STATEMENT OF THE CASE

The statement of facts presented in the petition of the Bossert Machine Company is acceptable as far as it goes. However, one additional fact should be brought to the attention of the court.

Perhaps the most significant fact in the case is the timing of the pleadings. The petition was filed on May 19, 1967. Under the law of Ohio, the answer should have been filed on or before June 17, 1967, approximately *one month*

later. The answer was, in fact, filed on September 13, 1967, *three months* after the filing of the petition.

No excuse of any kind at any time was ever offered for this inordinate delay in filing an answer.

REASONS FOR DENYING THE WRIT

The basic question presented in this matter is whether property is being taken without due process of law. The question of due process involves Article III, Section 2, the Fifth and Fourteenth Amendments of the Constitution of the United States. The matter also involves Article XIII, Section 5, and Article I, Section 19, of the Constitution of Ohio. These articles of the Ohio Constitution (see Appendix) provide that private property shall not be taken for public use unless compensation therefor shall be paid for in money, and that compensation shall be determined by a jury of twelve men.

The eminent domain statutes of Ohio have long held that an answer denying the valuation set by the government must be filed within a stated period of time. If no answer is filed within the stated period of time, then it is conclusively presumed that the owner accepts the value set by the government. The only thing that need be done by the property owner is the filing of an answer. It is not necessary that he allege a counter-valuation in his answer or deny anything other than the valuation. The date on or before which the answer must be filed is clearly set out on the writ attached to the petition served each defendant in each case.

The Supreme Court of Ohio, on several occasions, has indicated that the requirement of answering an appropriation petition and denying the value contained therein is in the nature of an appeal. In other words, the filing of

the answer on time is jurisdictional, just as the filing of a notice of appeal is jurisdictional.

Many other states have similar laws, and have similarly construed them to the extent of denying the property owner a jury trial on the matter of valuation unless the landowner demands a trial.

A second more specific question is whether a person can waive a jury trial guaranteed to him by the Ohio Constitution, either by agreement or by mere inaction.

This question, too, has been answered several times by the Supreme Court of Ohio and of other states. There seems little doubt that a person may waive a jury trial if he does not wish it. The fact that this may be done in criminal cases is so evident as not to require discussion. Rules of court often require that juries be demanded in criminal trials within a certain period of time before trial.

It would seem that the appellants simply and utterly failed to make any effort of any kind to preserve their rights. They had abundant time in which to file an answer denying the valuation set up by the City, and simply did not do so. They have not been denied due process but have denied it to themselves by not even requesting it. A jury trial could have been had by them upon demand. The valuation of the City could easily have been denied. There was ample time in which to demand a jury or to deny the valuation. Neither was done, at no fault of the appropriating agency.

REVIEW OF THE CASES AND LAW

The Supreme Court of Ohio, in addition to the decision in the instant matter, had at least twice before, handed down decisions in closely analogous situations (*In Re Appropriation for Highway Purposes,* 177 O.S. 118,

29 O.O. 2d 316, 203 N.E. 2d 247 — 1964; *In Re Appropriation of Easement for Highway Purposes,* 172 O.S. 338, 16 O.O. 2d 116, 175 N.E. 2d 512 — 1961). Both of these cases involve procedure under Chapter 5519, Ohio Revised Code, which is a chapter involving appropriation by the State Highway Department and, in many respects, similar to Chapter 163 of the Ohio Revised Code under which the appropriation in this matter was effected.

Chapter 5519 sets forth the procedure for appropriation which, except for nomenclature, follows the pattern of Chapter 163; namely, that the director of highways must file a petition setting forth the valuation set upon the property by the government; within 30 days the owner must file a paper objecting to the valuation; if no such objection is filed, the property is taken by the highway department at the value asserted by the director of highways.

In both of these cases, the Supreme Court of Ohio found that the . .

> "filing of a petition setting forth the intention to appeal, as provided in the above quoted section, is comparable to the filing of a notice of appeal in the ordinary civil action and, consequently, is jurisdictional."

The Supreme Court of Ohio, in *Bethesda Hospital* v. *Preston,* (175 O.O. 277, 194 N.E. 2d 139 — 1963) considered the question whether Article I, Section 19, of the Ohio Constitution, relative to the determination of compensation by a jury, is mandatory. In this case there was a positive waiver of a jury trial, rather than a failure to demand a jury within a certain time. The court, however, in the opinion, stated that this section was not mandatory and further:

> "It appears that the great weight of authority supports the proposition that the parties in a highway

> land acquisition may, by stipulation or agreement, waive the constitutional provision that compensation shall be assessed by a jury."

This case indicates that the right to a jury trial may be delayed by positive action.

Other cases indicate that a jury trial may be waived by inaction. In *Cassidy* v. *Glossip* (12 O.S. 2d 17), the Supreme Court of Ohio considered rule 22 of the Common Pleas Court of Butler County, which provided that failure to demand a jury trial three days before trial shall be deemed a waiver of jury trial. The Supreme Court stated,

> "A rule of a common pleas court, providing that a party shall request a jury not later than the third day prior to the date of the commencement of the trial, or shall be deemed to have waived a jury trial, is a procedural rule that does not deny a party his right to a jury trial or otherwise conflict with Section 5 of Article I of the Constitution."

Although the *Cassidy* case did not involve an appropriation action and did not involve Article I, Section 19 of the Ohio Constitution, it nonetheless stands for the proposition that a right to jury trial guaranteed by the Constitution can be waived by inaction on the part of the parties involved.

In Corpus Juris Secundum, we find the statements:

> "A constitutional guarantee that the compensation shall be assessed by a jury may be waived, as where there is a failure to make due and timely application for jury trial on appeal from an award by commissioners or on appeal from a judgment confirming such award." (29 C.J.S., Eminent Domain, Section 281, page 1285.)

> "There must be a demand made for a jury, and the right to a jury is waived by failure to make such demand within the time fixed by statute." (30 C.J.S., Eminent Domain, Section 372, page 71.)

Under the Federal Rules of Civil Procedure, Rule 71A (h), 28 U.S.C.A., any party to a condemnation proceeding is entitled to a jury trial of the issue of compensation and may obtain such trial by filing a demand therefor within the time allowed for answer or within such further time as the court may fix (*Atlantic Seaboard Corp.* v. *Van Sterkenburg,* 318 F. 2d 455). But the denial of a tardy demand for a jury is not considered to be an abuse of discretion (ibid.) Thus, under the federal rules, although there is no specific time limit on the right to demand a jury, the right may be lost by excessive delay.

CASES OF APPELLANTS DISTINGUISHED

One case which the appellants have been citing from the first appeal in the State of Ohio has been the *Shario* case. (*Shario* v. *State,* 105 O.S. 535.) This case is simply not applicable to this matter. The *Shario* case has been quoted by appellants to stand for the proposition that the General Assembly may not limit the time within which an appeal may be taken. The *Shario* case assuredly does not stand for this proposition. In fact, it holds exactly the opposite proposition, and this was commented on by the Supreme Court of Ohio.

Appellants in quoting *Shario,* have confused action taken after jurisdiction is invoked with action to invoke jurisdiction. *Shario* states that the legislature may not prescribe the time within which a case must be heard after the jurisdiction of the court has been invoked. But *Shario* further states:

> ". . . prescribing the manner of invoking the jurisdiction, the pleadings, and the time within which jurisdiction shall be invoked . . . has always been regarded in the proper province of legislative action . . ."

In other words, the *Sharlo* case only stands for a proposition admitted by the appellees, namely, that the legislature may not interfere with the court's running its own docket. However, this rule of law has absolutely no application to the present matter. Chapter 163 states that the court does not even have jurisdiction to hear the matter unless an answer has been filed on time.

In Re Appropriation (120 O.A. 273, 201 N.E. 2d 889), stands for the same proposition that after jurisdiction is taken by the court, the legislature is powerless to dictate the running of the court's docket. It has no application to the present matter.

Three other cases cited by the appellant only stand for the general proposition that one is entitled to due process of law. (*Anderson National Bank* v. *Luckett,* 64 S. Ct. 599; 321 U.S. 233; *Shelley* v. *Kraemer,* 68 S. Ct. 836, 334 U.S. 1; *State* v. *Brown,* 182 S.E. 838, 294 S. Ct. 294; Appeal dismissed, 56 S. Ct. 750, 298 U.S. 639.)

Another case has been cited by appellants to support their proposition. Amazingly, it clearly stands for the opposite proposition; and was, in fact, quoted to support the opinion of the Supreme Court of Ohio in its decision. This is *Reckner* v. *Warner* (22 O.S. 275 — 1872). This case states that the constitutional guarantee of the jury trial nonetheless permits the legislative branch to set forth procedures by which the jury is obtained.

The appellants also claim that this court knows that there are justifiable reasons for granting leave to plead such as death, disability, minority, absence from the state. The question herein is not excuses for the failure to plead,

in the sense of filing responsive pleadings, but excuses for the right to file a notice of appeal within time. This court knows that the filing of the notice of appeal within time is jurisdictional and, except for the most extreme reasons, will not be waived. Whether the necessity of filing one's answer on time, under Ohio law, could ever be waived, even for the most serious reasons, is not ever relevant to this case, because the appellants did not file an answer for some two months after the time they should have answered, and have given absolutely no reason for failing to act. If an exception is available to them, they have utterly failed to show that they come within the exception.

The only statement remotely explanatory made by the appellants is that they had to hire appraisers to determine what the value of their property is. This is hardly an excuse, because as has been indicated before, all that had to be done upon being sued, was filing an answer denying the valuation. If the appraisal should have indicated that the value alleged by the City was correct, then an agreement could have been reached with the City without jury trial, or the answer withdrawn.

In a parallel situation one does not claim that a notice of appeal was not filed because the law had not been researched. Similarly, all that was ever required of the appellants in this matter was the simple technical procedure of filing an answer within 30 days. They had ample time to do so and failed to do so.

Appellants have indicated that we are concerned with a quick take procedure which is contrary to guarantees of due process under the Ohio and Federal Constitutions.

We are not concerned with a quick take procedure in any way. The quick take procedure, under Chapter 163, provides that property may be taken in certain instances

before a determination of the value of that property by a jury. There is no question that this is a difficult area of the law. As a matter of fact, the quick take procedure has almost never been tried in the state of Ohio and never in the city of Cincinnati. The quick take procedure, which is a separable part of Chapter 163, was not used in this case and is not applicable to this case. The property in this matter was not taken until ample time for the demand for a jury trial had been afforded appellants. Compensation was awarded before the take.

Lest this court feel that the State of Ohio is somehow more harsh than others in regard to jurisdictional appeal time in appropriation matters, the law of some other States having similar appeal provisions might be considered.

Indiana provides us with a legal situation almost on "all fours" with the one in Ohio. Section 3-1702 of the Indiana Statutes Annotated provides that condemnation proceedings may be brought in the Circuit or Superior Court of the county where such land is situated. Section 3-1704 provides for the appointment of appraisers to place a valuation on the property being taken. Section 3-1707 provides in part:

> "Any party to such action aggrieved by the assessment . . . may file written exceptions thereto in the Office of the Clerk of such Court . . . within ten (10) days after filing of such report . . ."

The case of *State* v. *Redmon,* 205 Indiana 335, considered the question of whether exceptions could be filed after the ten (10) day period provided in Section 3-1707, and came to the conclusion that they could not be so filed. At Page 338 the Court reasons:

> ". . . there is no express statutory authority" to allow a party to file his pleadings after the time limited therefor.

> "A trial court may, in its discretion, extend the time for filing pleadings when the fixing of the time is within the discretion of the Court, but a trial court cannot extend the time when the time is fixed by statute. This is especially true when the time limited constitutes an element of a right or privilege which is being asserted in a pleading in a special statutory proceeding . . . either party to a condemnation proceeding has the privilege of filing written exceptions to the assessment of damages within ten (10) days after the filing of the Appraisers' report. It is clear that neither party can file exceptions after the expiration of the ten (10) days if neither party has filed within the ten (10) days".

It is clear that, in a situation similar to ours, the State of Indiana forbids exceptions to be taken to the valuation after the statutory period for exceptions has passed.

Article II, Section 9 of the Constitution of *West Virginia* states in part:

> "Private property shall not be taken . . . without just compensation . . . when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders."

Article III, Section 13 reads in part:

> "In suits at common law, where the value in controversy exceeds twenty dollars . . . the right of trial by jury, if required by either party, shall be preserved . . ."

The Supreme Court of West Virginia considered the constitutional provisions above in *State* v. *Boggess,* 126 S. E. (2d) 26 (1962), where a landowner did not demand a jury trial in an appropriation matter within 10 days provided for by statute. The Court stated:

> "There was no right to a jury trial in an eminent domain proceeding at common law."

> "The landowner, therefore, has no right to a jury trial in this eminent domain proceeding except to the extent that such right is provided for by the Constitution and the statutes which confer such right."
>
> "The right to a jury trial in an eminent domain proceeding requires positive action on the part of the one desiring such jury trial."

In *Minnesota,* we come across a situation very similar to Ohio. Chapter 117.015, Part 3, provides for the filing of a petition in an eminent domain action in the District Court of the county in which the land is situated. Chapter 117.09 provides for the filing of a report by the Commissioners. Chapter 117.3 provides in part:

> "At any time within thirty (30) days after service of notice that the report has been filed, the owner of lands taken may appeal to the District Court from any award of damages embraced in the report . . ."

In the case *In Re Eystad,* 214 Minn. 490, the Court, in construing Section 117.20 (similar to 117.13 but applying eminent domain proceedings in State Highway matters) the Court held:

> "We hold without hesitancy, that the latter act (Section 117.20) governs, and affords the exclusive means whereby the landowner may review his award, and that appeals thereunder (proceedings by the State, its agencies or political subdivisions) must be taken within thirty (30) days from the date of the filing of the Commissioners' report."

Once again, it is evident that the landowner being given the right to appeal from the determination of value set by the State, must do so within the period of time provided by law or he is forever barred from doing so.

Title 66, Section 55 of the *Oklahoma* Statutes Annotated provides, in part:

> "The report of the Commissioners may be reviewed by the District Court on written exceptions filed by either party in the Clerk's office within thirty (30) days after the filing of such report . . . or either party may, within sixty (60) days after the filing of such report, file with the Clerk a written demand for a trial by jury . . ."

In the case of *Stedman* v. *State Highway Commission,* 174 Okla. 308, the Court held that the demand for a jury trial in the condemnation proceeding, if not filed within thirty (30) days after the filing of the Commissioners' Report, did not authorize an Order granting re-trial. To the same effect is *Western Farmers Electric Co-op* v. *Rowlett,* (Okla.) 288 Pacific 2d 726.

The law of Oklahoma indicates that a jury trial is the right of the person whose property is being taken, but he must take proper procedural steps to preserve it.

Chapter 472.4 of the *Iowa* Code Annotated, provides for a Commission to assess damages in eminent domain procedures. Chapter 472.18 provides, in part:

> ". . . any party interested may, within thirty (30) days after the assessment is made, appeal . . . by giving the adverse party . . . written notice that such appeal has been taken . . ."

In the case of *Kromar* v. *Independent School District,* 192 Iowa 734, the refusal of a district court to try a case because of a defective appeal, was sustained. The Court reasoned:

> "Aside from the constitutional provision, the right of appeal is created by statute; it is purely statutory in the instant case, and consequently the language

> of the statute and the clear intent as expressed therein must govern. The Notice of Appeal must be given in the method prescribed and in substantial compliance with the statute."

Iowa Law, therefore, in respect to eminent domain proceedings, corroborates the general principle that appeals must be perfected strictly in accordance with the methods of procedure.

The *Michigan* Constitution of 1908, Article XIII, provided in part as follows:

> "Section 2 — when private property is taken for the use . . . of the public . . . the just compensation . . . shall be ascertained by a jury of twelve (12) freeholders . . . or by not less than three (3) Commissioners . . . as shall be prescribed by law."

In the Constitution of 1963, this Article has been omitted and instead we find, in Article X, Section 2, the following:

> ". . . private property shall not be taken for public use without just compensation therefor being first made, or secured in a manner prescribed by law. Compensation shall be determined in a proceeding in a court of record."

It thus becomes evident that in the State of Michigan it was found desirable not to include the guarantee of a right to a jury trial in eminent domain proceedings by the Constitution.

Article I, Section 15, of the *Rhode Island* Constitution, provides that:

> "The right of trial by jury shall remain inviolate."

Chapter 37-6-18 of the Rhode Island Statutes reads:

> "Any owner . . . who cannot agree with the acquiring authority upon the price to be paid for his

> estate . . . may . . . apply by petition to the superior court . . . praying for an assessment by a jury."

The Supreme Court of Rhode Island considered whether a jury trial was mandatory or not in the case of *Atlantic Refining Co.* v. *Director of Public Works,* 200 A. 2d 580 (1964).

The court stated:

> ". . . a person whose property was taken for a public use had the right to have a jury assess his damages at least as far back as 1798 . . ."
>
> "having determined that 37-6-18 is directory and not mandatory, it necessarily follows that a petitioner proceeding thereunder should be afforded the right to waive a jury trial."

The procedures of chapter 163 are used by virtually all appropriating agencies throughout the State of Ohio. The need for answering within time is a great aid in expediting eminent domain matters where, otherwise, delay is almost standard operating procedure for those whose property is being taken for public improvement.

The concern of the legislature for expeditious handling of eminent domain matters is reflected in section 163.22, O.R.C., which reads in part:

> "Such proceedings shall be advanced as a matter of immediate public interest and concern and shall be heard by the court at the earliest practicable moment."

As far back as 1872 this court in the *Reckner* case, supra, stated with regard to landowners whose property is to be taken:

> ". . . a wise policy would dictate that he should be diligent in the assertion of his rights, so that the

wants of the public may be supplied without unnecessary delay."

SUMMARY

There seems little doubt that the main problem in this case is that appellants failed to file in timely fashion what in effect was a notice of appeal. They had ample time in which to file the notice and did not do so, and have offered no explanation as to why they did not do so.

Their rights to a jury trial in the matter of compensation for property taken was fully guaranteed to them. They could have obtained a jury trial simply by demanding it. They did not take any steps to preserve their rights and cannot now claim that their rights have been denied.

WHEREFORE, Appellee City of Cincinnati respectfully requests this court to deny a Writ of Certiorari.

THOMAS H. CRUSH
Assistant City Solicitor

APPENDIX A

CONSTITUTION OF OHIO
ARTICLE I, SECTION 19

Sec. 19. Inviolability of private property.

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

APPENDIX B

CONSTITUTION OF OHIO
ARTICLE XIII, SECTION 5

Section 5. Right of Way.

"No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law."

SUPREME COURT, U. S.

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Value is the very heart of an appropriation case, even as *guilt* is the heart of a criminal case. *Value* alone is the sole issue, therefore to merely deny the City's allegation of value does not comply with the mandate of § 163.08, which requires the pleader to *set forth* "the facts relied upon in support of such a denial." The only "fact" was the real *value* and that was not available until after the property was appraised at $65,000.

Respondent argues in its brief that:

> "No excuses of any kind at any time was ever offered * * *." (p. 2)
>
> "It is not necessary that he allege a counter-valuation in his answer or deny anything other than the valuation." (p. 2)

> "It would seem that the appellants simply and utterly failed to make any effort of any kind to preserve their rights." (p. 3)
>
> "The valuation of the City could easily have been denied." (p. 3)
>
> "* * * and have given absolutely no reason for failing to act." (p. 8)
>
> "* * * all that had to be done upon being sued, was filing an answer denying the valuation." (p. 8)
>
> "* * * and have offered no explanation as to why they did not do so." (p. 15)

Thus it can be seen that Respondent relies solely upon a misinterpretation of the requirement of § 163.08, even as it has done from the beginning of this litigation. It is submitted that this appears more like "confession and avoidance" rather than answering the real issue as to the constitutionality of the operating effect of §§ 163.08 and 163.09.

As Ohio Court of Appeals Judge Duffy wrote in an unreported case involving these two sections of the Ohio Code:

> "It is 'compensation', and *not some estimate,* which is to be paid in money or secured by a deposit. *'Compensation shall be assessed by a jury and not by the city.'* (Emphasis added).

It is wrong to permit a "failure to act" as a basis for taking property without due process. As Judge McBride held in an identical case to this one and in holding these two Ohio statutes unconstitutional:

> "It is true that certain constitutional rights may be waived; however, such waiver *must be clear and expressed and cannot be built upon a failure to do anything and cannot be imposed by legislative conditions*

which are contrary to the specially expressed constitutional right in eminent domain cases." (Emphasis supplied.) Montgomery County, Ohio 127646, Board v. Tudor.

Respondent cites several cases from other states, none of which are applicable nor even persuasive as to a determination of the issue here. For instance, Michigan saw fit to drop its constitutional provision providng for a jury trial in appropriation cases. The Oklahoma case merely decided that where the owner announced "ready for trial," he could not later complain that his case was tried by the same jury "which had tried several other similar cases". The West Virginia case turned on the point that the condemnor had sought a jury, but later waived it before the condemnee had demanded a jury. The West Virginia Court held under the peculiar law of that state no jury could be required.

This Petition for Certiorari should be granted to allow amplification.

Respectfully submitted,

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